Supreme Court, U.S.
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IN THE

Supreme Court of the United States

FEDERAL MARITIME COMMISSION,
Petitioner,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-1481

SOUTH CAROLINA STATE PORTS AUTHORITY,
Petitioner,

v.

FEDERAL MARITIME COMMISSION;
United States of America, Respondents.

State of Maryland; State of Alabama; State of Arkansas; State of Connecticut; State of Delaware; State of Florida; State of Georgia; State of Iowa; State of Louisiana; State of Maine; State of Mississippi; State of Montana; State of Nevada; State of North Carolina; State of North Dakota; State of Oklahoma; State of Oregon; State of South Carolina; State of South Dakota; State of Virginia; State of West Virginia; National Association of Waterfront Employers, Amici Curiae.

Argued Jan. 22, 2001.

Decided March 12, 2001.

Before WILKINSON, Chief Judge, NIEMEYER, Circuit Judge, and HOWARD, United States District Judge for the Eastern District of North Carolina, sitting by designation.

Reversed and remanded with directions to dismiss by published opinion. Chief Judge WILKINSON wrote the opinion, in which Judge NIEMEYER and Judge HOWARD joined.

OPINION

WILKINSON, Chief Judge:

This case requires us to decide whether a state's sovereign immunity protects it from being brought before a federal administrative tribunal by a private party. We hold that the state's immunity prevents such a suit or proceeding.

South Carolina Maritime Services, Inc. (Maritime Services), a cruise ship company, filed a complaint with the Federal Maritime Commission (FMC) against the South Carolina State Ports Authority (SCSPA). The suit sought reparations and injunctive relief for alleged violations of the Shipping Act of 1984, 46 U.S.C. app. § 1701 et seq. (1994). The FMC held that state sovereign immunity does not extend to private complaints filed before a federal agency. Because a state's sovereign immunity is not so fleeting as to depend upon the forum in which the state is sued, the judgment of the FMC is reversed and the case is remanded with directions to dismiss it.

I.

Maritime Services operates a cruise ship, the M/V TROPIC SEA. Passengers may gamble on board the ship while it is in international waters. The South Carolina State Ports Authority has a policy of refusing to berth ships whose primary purpose is gambling. The SCSPA allows some ships that permit gambling to berth, but only so long as gambling is not their primary purpose. The SCSPA refused to give the M/V TROPIC SEA a berthing space at the port of Charleston because it claimed the ship's primary purpose was to facilitate gambling.

Maritime Services, believing that it was being singled out for unfair treatment, filed a complaint with the FMC under the Shipping Act of 1984. The Shipping Act regulates the oceanborne foreign commerce of the United States. The Act prohibits discrimination by carriers and terminal operators and allows the FMC to regulate any agreement involving oceanborne foreign commerce. *Id.* §§ 1701(l), 1703(a) & (b). Maritime Services alleged that the SCSPA, as a terminal operator, had violated the Shipping Act by unreasonably refusing to deal and by unreasonably preferring other cruise ship companies to the disadvantage of Maritime Services. *Id.* § 1709(b)(11) & (d)(3). The complaint asked for a cease and desist order, actual damages, interest, and attorney's fees.

The SCSPA's response raised, *inter alia*, the argument that South Carolina's sovereign immunity prohibits private parties from suing the SCSPA before a federal agency. In support, the SCSPA noted that in *Ristow v. South Carolina Ports Authority*, 58 F.3d 1051 (4th Cir.1995), this court held that the SCSPA is protected by South Carolina's sovereign immunity because it is an arm of the state. The ALJ agreed and dismissed the suit on sovereign immunity grounds. The FMC then reviewed the case on its own motion. In reversing the ALJ, the FMC held that sovereign immunity does not bar private suits against the states before federal agencies. The SCSPA now appeals.

II.

The doctrine of sovereign immunity predates the founding of our nation. *See* W. Blackstone, Commentaries on the Laws of England 234-35 (1765). And "[a]lthough the American people had rejected other aspects of English political theory, the doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified." *Alden v. Maine*, 527 U.S. 706, 715-16, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999) (citing *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 434-35, 1 L.Ed. 440 (1793) (Iredell, J., dissenting)).

Notwithstanding the presumed universality of this doctrine, the Supreme Court held in 1793 that a private citizen of South Carolina could in fact sue the State of Georgia without its consent. *Chisholm*, 2 U.S. at 420. Justice Iredell dissented,

contending that both before and after the adoption of the Constitution, the states maintained their sovereign right to be protected from suit without consent. *Id.* at 435-36, 448, 449-50 (Iredell, J., dissenting). The decision in *Chisholm* "fell upon the country with a profound shock" and was quickly overruled by the Eleventh Amendment. *Alden*, 527 U.S. at 720, 722, 119 S.Ct. 2240 (internal quotations omitted). The Eleventh Amendment provides that: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. Although the literal text of the Amendment speaks only to suits filed by citizens of one state against another state, the Supreme Court held in *Hans v. Louisiana*, 134 U.S. 1, 21, 10 S.Ct. 504, 33 L.Ed. 842 (1890), that sovereign immunity barred a citizen from suing his own state without consent. This is because the principle of sovereign immunity derives not just from the Eleventh Amendment, but from the structure and background principles of the Constitution. *Hans*, 134 U.S. at 11-12, 10 S.Ct. 504. It is with these background principles in mind that the Supreme Court decided two recent cases concerning state sovereign immunity: *Seminole Tribe of Florida v. Florida*, 517 U.S.44,116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), and *Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999). These two decisions provide significant guidance on how to resolve the underlying dispute.

A.

The *Seminole Tribe* case involved the Indian Gaming Regulation Act (IGRA), 25 U.S.C. § 2710(d), enacted under the Indian Commerce Clause. U.S. Const. art. I, § 8, cl. 3. Pursuant to the IGRA, the Seminole Tribe of Florida asked a federal district court to order the State of Florida to negotiate with the Tribe in good faith.

The Supreme Court affirmed the dismissal of the Tribe's suit, holding that Congress could not, in the exercise of its Article I powers, abrogate a state's sovereign immunity in federal court. 517 U.S. at 73, 116 S.Ct. 1114. According to the Court, "the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area ... that is under the exclusive control of the Federal Government." *Seminole Tribe*, 517 U.S. at 72, 116 S.Ct. 1114. Moreover, "[e]ven when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." *Id.* Noting that " [t]he Eleventh Amendment restricts the judicial power under Article III," the Supreme Court explained that "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Id.* at 72-73, 116 S.Ct. 1114.

In reaching its decision, the Supreme Court held that the sovereign immunity principle is sufficiently strong that it transcends the literal text of the Eleventh Amendment and applies regardless of the type of relief sought. The Court noted that the Eleventh Amendment does not stand "'so much for what it says, but for the presupposition ... which it confirms.'" *Id.* at 54,116 S.Ct. 1114. (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991)). The presupposition is that "each State is a sovereign entity in our federal system" and that "'it is inherent in the nature of sovereignty not to be amenable to the suit of an individual'" without consent. *Id.* (quoting *The Federalist No. 81*, p. 487 (C. Rossiter ed. 1961) (A. Hamilton)). Thus the Eleventh Amendment merely confirmed, rather than established, the structural principle of state sovereign immunity. Accordingly, the Court concluded that the " 'States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a surrender of this immunity

in the plan of the convention.'" *Id.* at 68, 116 S.Ct. 1114 (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322-23, 54 S.Ct. 745, 78 L.Ed. 1282 (1934)).

With respect to the type of relief sought, *Seminole Tribe* held that the doctrine of sovereign immunity applies even if the suit against the state seeks no damages but only requests injunctive relief. According to the Court, "the type of relief sought is irrelevant to whether Congress has power to abrogate States' immunity." *Id.* at 58, 116 S.Ct. 1114. This is because the "Eleventh Amendment does not exist solely in order to preven[t] federal-court judgments that must be paid out of a State's treasury, it also serves to avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Id.* (alteration in original) (internal quotations and citations omitted). Accordingly, the fact that the IGRA only authorized prospective injunctive relief was of no moment in determining the scope of Congress' abrogation authority.

B.

Alden v. Maine is the other recent sovereign immunity decision that informs our inquiry. A group of probation officers filed suit in federal court against the State of Maine. The officers alleged that the state had violated the Fair Labor Standards Act of 1938 (FLSA). *Alden*, 527 U.S. at 711, 119 S.Ct. 2240. While that suit was pending, *Seminole Tribe* was decided and the federal complaint was dismissed. *Id.* at 712, 119 S.Ct. 2240. The probation officers then filed the same action in state court because the FLSA authorized private state court actions against the states, regardless of consent. *Id.*

Just as *Seminole Tribe* held that state sovereign immunity transcends the type of relief sought, *Alden* held that the sovereign immunity of the states transcends the forum in which the state is sued. Thus, the Court held that sovereign immunity bars suits in state courts just as it does in federal courts. According to the Supreme Court, "the

powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts." *Id.*

Alden explained clearly why state sovereign immunity applies regardless of the forum in which the private action is prosecuted. According to the Court, "[p]rivate suits against nonconsenting States ... present the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties, regardless of the forum." *Id.* at 749, 119 S.Ct. 2240 (internal quotations and citations omitted). Compounding the harm is the fact that "[n]ot only must a State defend or default but also it must face the prospect of being thrust, by federal fiat and against its will, into the disfavored status of a debtor, subject to the power of private citizens to levy on its treasury or perhaps even government buildings or property which the State administers on the public's behalf." *Id.* Accordingly, *Alden* recognized that whether a state is entitled to sovereign immunity "does not turn on the forum in which the suits [are] prosecuted." *Id.* at 733, 119 S.Ct. 2240. Rather, sovereign immunity applies whenever a private individual attempts to sue a non-consenting state. *Id.*

In explicating this holding, *Alden* also reaffirmed the *Seminole Tribe* principle that state sovereign immunity extends beyond the text of the Eleventh Amendment. According to the Court, "[t]o rest on the words of the Amendment alone would be to engage in the type of a historical literalism" that has been rejected "since the discredited decision in *Chisholm*." *Id.* at 730, 119 S.Ct. 2240 (citing *Seminole Tribe*, 517 U.S. at 68, 116 S.Ct. 1114). In determining that sovereign immunity protected states from suits in their own courts, the Court found it irrelevant "that the Eleventh Amendment by its terms limits only '[t]he Judicial power of the United States.'" *Id.* (alteration in original). Rather, *Alden* recognized that state sovereign immunity is an overarching principle of the Constitution. *Id.* at 713, 119 S.Ct.

2240. Instead of focusing on the literal terms of the Eleventh Amendment, the Court looked at the historical underpinnings of the doctrine of sovereign immunity. This historical inquiry yielded *Alden's* conclusion that sovereign immunity bars any private suit against a non-consenting sovereign. "The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity." *Id.* at 715, 119 S.Ct. 2240. As Alexander Hamilton explained: "'It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union.'" *Id.* at 716-17, 119 S.Ct. 2240 (quoting The Federalist No. 81). Indeed, the antiquity of the doctrine is such that the Supreme Court found it "so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted." *Hans*, 134 U.S. at 16, 10 S.Ct. 504.

Moreover, it is equally well established that sovereign immunity bars not just lawsuits filed in courts of law, but rather all proceedings against a non-consenting sovereign. Thus, the Court noted the "'presumption that no anomalous and unheard of proceedings or suits were intended to be raised up by the Constitution—anomalous and unheard of when the constitution was adopted.'" *Alden*, 527 U.S. at 727, 119 S.Ct. 2240 (quoting *Hans*, 134 U.S. at 18, 10 S.Ct. 504). This language, referring to "proceedings or suits," makes it clear that certain proceedings, while not suits, are nevertheless barred by the doctrine of sovereign immunity. *Alden* cautioned, however, that the defense of sovereign immunity "does not confer upon the State a concomitant right to disregard the Constitution or valid federal law." *Id.* at 754-55, 119 S.Ct. 2240. Rather, the "States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design." *Id.* at 755, 119 S.Ct. 2240.

Alden outlined six exceptions to the doctrine of sovereign immunity. First, sovereign immunity does not bar a suit where the state has given consent. Second, states remain subject to suits brought by the Federal Government or by other states. Third, Congress retains the power to abrogate the sovereign immunity of the states pursuant to the Fourteenth Amendment's Section 5 enforcement power. Fourth, sovereign immunity does not bar private suits against municipal corporations or other lesser governmental entities. Fifth is the *Ex parte Young* exception, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), which allows certain private suits against state officers if the suit seeks only injunctive or declaratory relief to remedy an ongoing violation of law. Sixth, state officers may be sued for money damages in their individual capacity, so long as the relief is sought from the officer personally. *Alden*, 527 U.S. at 755-57, 119 S.Ct. 2240.

C.

Seminole Tribe and *Alden* make clear that state sovereign immunity, while not absolute, is among the Constitution's foremost principles. This constitutional commitment to dual sovereignty is no radical idea. As the Supreme Court has repeatedly explained, embedded in the structure of the Constitution is the principle that a private party may not file a complaint against an unconsenting state. With these lessons firmly in mind, we turn to the merits of the claim before us.

III.

The FMC and the United States argue that despite *Seminole Tribe* and *Alden*, sovereign immunity for the South Carolina State Ports Authority is inappropriate in this case. They posit two primary reasons for the SCSPA's lack of sovereign immunity. First, they contend that the FMC is not a court and thus does not exercise the judicial power of the United States. Second, they argue that the proceeding in

front of the FMC is not a lawsuit. We address each contention in turn.

A.

The respondents FMC and the United States first assert that sovereign immunity does not apply in agency actions because agencies do not exercise the judicial power of the United States. *See* U.S. Const. amend. XI ("The Judicial power of the United States shall not be construed...."). Since the FMC is an agency operating under the Executive Branch, and not a court, they argue that sovereign immunity is inapplicable in this case. They point out that the agency has no independent enforcement power.

The FMC and the United States contrast the powers exercised by the FMC here with the authority exercised by the Tax Court in *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 111 S.Ct. 263, 115 L.Ed.2d 764 (1991). In *Freytag*, the Supreme Court held that the Tax Court, an Article I entity, "exercises its judicial power in much the same way as the federal district courts exercise theirs." *Id.* at 891, 111 S.Ct. 2631. Because the Tax Court is "an adjudicative body" that can, *inter alia*, subpoena witnesses, order production of documents, administer oaths, grant certain injunctive relief, order the Secretary of the Treasury to refund an overpayment, and punish contempts by fine or imprisonment, the Tax Court is a Court of Law despite being part of the Executive Branch. *Id.* Thus, "[b]y resolving those disputes" between taxpayers and the Government, "the court exercises a portion of the judicial power of the United States." *Id.*

The FMC and the United States argue that the differences between the Tax Court and the adjudicative authority of the FMC make it clear that only the former is a court. The Tax Court, unlike the FMC, can enforce its orders. 46 U.S.C. app. § 1713(c) (Attorney General may seek enforcement by the district court of a subpoena issued by the FMC); *id.* §

1712(e) (Attorney General may seek recovery in district court of civil penalties assessed by the FMC). Moreover, the Tax Court only decides cases, whereas the FMC also exercises executive, legislative, and administrative responsibilities. Finally, respondents point out that while the Tax Court does not make political decisions, the FMC does.

Whether the FMC is exercising the judicial power as outlined in *Freytag*, however, is irrelevant to the disposition of this case. The central lesson from *Freytag* is that adjudication by adversarial proceedings *can* exist outside the context of Article III. *Freytag*, 501 U.S. at 889, 111 S.Ct. 2631; *accord id.* (Congress has "wide discretion to assign the task of adjudication in cases arising under federal law to legislative tribunals"); *id.* at 910, 111 S.Ct. 2631 (Scalia, J., concurring) ("It is true that Congress *may* commit the sorts of matters administrative law judges and other executive adjudicators now handle to Article III courts—just as some of the matters now in Article III courts could instead be committed to executive adjudicators."). The precise limits of what does or does not constitute a court under *Freytag* are less important than the overarching principle *Freytag* establishes—Article I tribunals may exercise the judicial power of the United States.

If Article I courts can indeed exercise the judicial power, it would seem anomalous to limit state sovereign immunity strictly to an Article III proceeding. *Alden* in fact confirms that state sovereign immunity "is not directly related to the scope of the judicial power established by Article III." *Alden*, 527 U.S. at 730, 119 S.Ct. 2240. Rather, it is a "separate and distinct structural principle" that "inheres in the system of federalism established by the Constitution." *Id.* And the Court has held that Congress can abrogate a state's sovereign immunity "only if there is 'compelling evidence' that the States were required to surrender this power to Congress pursuant to the constitutional design." *Id.* at 731, 119 S.Ct. 2240 (quoting *Blatchford*, 501 U.S. at 781, 111 S.Ct. 2578).

No "compelling evidence" exists. To the contrary, *Alden* demonstrates that the founding generation understood the Constitution "to preserve the States' traditional immunity from private suits." 527 U.S. at 724, 119 S.Ct. 2240. It was the spectre of private suits against the states that mattered to the founders, not the forums in which those suits might happen to be brought. At the time of ratification, the states were concerned about private citizens filing complaints against them without their consent. They understood that being subjected to such proceedings would affront a "fundamental aspect of [their] sovereignty." *Id.* at 713, 119 S.Ct. 2240.

More practically, the states "'were heavily indebted as a result of the Revolutionary War. They were vitally interested in the question whether the creation of a new federal sovereign, with courts of its own, would automatically subject them, like lower English lords, to suits in the courts of the "higher" sovereign.'" *Id.* at 716, 119 S.Ct. 2240 (quoting *Nevada v. Hall*, 440 U.S. 410, 418, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979)). "It is indisputable that, at the time of the founding, many of the States could have been forced into insolvency but for their immunity from private suits for money damages." *Alden*, 527 U.S. at 750, 119 S.Ct. 2240. In order to ensure passage of the Constitution, "[t]he leading advocates of the Constitution assured the people in no uncertain terms that the Constitution would not strip the States of sovereign immunity." *Id.* at 716, 119 S.Ct. 2240; *accord id.* at 716-18, 119 S.Ct. 2240 (citing founders such as Hamilton, Madison, and Marshall). The lesson from "the Constitution's structure, its history, and the authoritative interpretations" by the Supreme Court is unmistakable—an adversarial proceeding against a non-consenting state by a private party triggers sovereign immunity. *Id.* at 713, 119 S.Ct. 2240.

The United States nevertheless asserts that the federal government can create Article I tribunals by which it can subject unconsenting states to proceedings by private parties. But would the founders have countenanced a system by which Congress could have avoided all the strictures of sovereign immunity by creating different tribunals where state sovereign immunity was completely inapplicable? To ask the question is to answer it. The states' concerns with affronts to their dignity and to the possibility of having to answer for their war debts would not disappear because the forum magically changed from an Article III court to an Article I tribunal. And while the coordinate branches of the federal government have the broadest latitude in organizing themselves as they see fit, they cannot employ an administrative structure that allows an end-run around the Constitution. Sovereign immunity is not so hollow a concept as to prohibit proceedings in certain fora like a federal or state court while at the same time permitting a similar proceeding to take place under the auspices of a legislative court or an agency adjudication. Dual sovereignty posits a relationship of mutual respect between Congress and the states. It is not consistent with that relationship for Congress to subject an unconsenting sovereign to the coercive club of private actions regardless of the forum. *See id.* at 733, 119 S.Ct. 2240 ("The logic" of sovereign immunity decisions like *Seminole Tribe* "does not turn on the forum in which the suits were prosecuted.").

Alden makes clear that any proceeding where a federal officer adjudicates disputes between private parties and unconsenting states would not have passed muster at the time of the Constitution's passage nor after the ratification of the Eleventh Amendment. Such an adjudication is equally as invalid today, whether the forum be a state court, a federal court, or a federal administrative agency.

B.

The FMC and the United States also insist that sovereign immunity does not apply because the Article I proceeding in this case is not a "suit in law or equity." U.S. Const. amend. XI. Rather, they argue that the administrative adjudication is merely a form of regulation, in which political appointees attempt to effectuate the intent of a statute. The

structure of the administrative proceeding, however, belies this point. Whether the proceeding is formally called an administrative action, a lawsuit, or an adjudication does not matter. The fundamental fact, which respondents cannot escape, is that this proceeding requires an impartial federal officer to adjudicate a dispute brought by a private party against an unconsenting state.

It is important to examine the precise nature of this proceeding, and to describe what it is really like. The Shipping Act sets forth a regime by which "any person" may bring a formal "complaint alleging a violation" of the Act. 46 U.S.C. app. § 1710(a). The complaint may ask for "reparation for any injury caused to the complainant." *Id.* The party named in the complaint must either "satisfy [it] or answer it in writing." *Id.* § 1710(b). The Act then mandates that if the complaint is not satisfied (i.e., settled), "the Commission *shall* investigate it in an appropriate manner and make an appropriate order." *Id.* (emphasis added). The Commission, "upon complaint or upon its own motion, may" also investigate "any conduct or agreement that it believes may be in violation of " the Act. *Id.* § 1710(c).

The Act also provides that in "investigations and adjudicatory proceedings," any party may utilize "depositions, written interrogatories, and discovery procedures." *Id.* § 1711(a). To the extent practicable, the rules for these proceedings "shall be in conformity with the rules applicable in civil proceedings in the district courts of the United States." *Id.* The FMC may also use the subpoena power to "compel the attendance of witnesses and the production of books, papers, documents, and other evidence." *Id.* If a party does not comply with a nonreparation order or with a subpoena, the Attorney General of the United States "may seek enforcement by a United States district court having jurisdiction over the parties." *Id.* § 1713(c). If the Commission orders reparation, "the person to whom the award was made may seek enforcement of the order in a United States district court having jurisdiction over the parties." *Id.* § 1713(d)(1).

When a party files a formal complaint under 46 U.S.C. app. § 1710(a), the investigation takes the form of an adjudication. *See* 46 C.F.R. § 502.61 (2000). ALJs are the presiding officers for the initial adjudication. *Id.* § 502.223. The ALJ "designated to hear a case shall have authority" to, *inter alia*, "sign and issue subpenas [sic]", "take or cause depositions to be taken," "delineate the scope of a proceeding," "hear and rule upon motions," "administer oaths and affirmations," "examine witnesses," "rule upon offers of proof," "act upon petitions to intervene," "hear oral argument at the close of testimony," "fix the time for filing briefs, motions, and other documents, " and "dispose of any other matter that normally and properly arises in the course of the proceedings." *Id.* § 502.147. Parties may, *inter alia*, depose witnesses, *id.* § 502.203; submit interrogatories, *id.* § 502.205; and submit requests for admission from opposing parties, *id.* § 502.207. The FMC reviews the ALJ's decision if a party requests an appeal or on the Commission's own initiative. *Id.* § 502.227.

The proceeding thus walks, talks, and squawks very much like a lawsuit. Its placement within the Executive Branch cannot blind us to the fact that the proceeding is truly an adjudication. The FMC and the United States argue, however, that despite the fact that the ALJ adjudicates the "case," *id.* § 502.147, and that the filing of a complaint necessarily "commence[s]" a "proceeding," *id.* § 502.61, the adjudication is in reality merely a form of regulation. The FMC and the United States contend that the agency simply uses adjudication as a means of implementing policy. The proceeding in their view is nothing more than an investigation of the merits of the claim. Indeed, they point out that the statute itself speaks in terms of "investigation." 46 U.S.C. app. § 1710(b). The FMC and the United States further maintain that the fact that only three commissioners of the FMC may come from the same party confirms that the agency's judicial function is only a means to implement its legislative objectives.

The adjudication, however, is just that—an adjudication. An impartial officer presides in an adversarial proceeding to

determine the rights and responsibilities of different parties. It is true that the commissioners may review the ALJ's decision. Nevertheless, this review is still impartial. *See* 5 U.S.C. § 554(d) (requiring separation of functions between adjudication and prosecution in administrative hearings); 46 C.F.R. § 502.224 ("The separation of functions as required by 5 U.S.C. § 554(d) shall be observed in proceedings" under the Shipping Act). Moreover, the ALJ issues subpoenas, authorizes depositions, hears witnesses, and otherwise conducts the proceedings in a judicious manner. Administrative law judges are what the name says they are—judges.

Indeed, the Supreme Court has recognized that ALJs are judges who decide cases. In *Butz v. Economou*, 438 U.S. 478, 511-14, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), the Court extended absolute judicial immunity to ALJs precisely because ALJs perform judicial acts. The Court held that "adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suits for damages." *Butz*, 438 U.S. at 512-13, 98 S.Ct. 2894. So as to leave no doubt, the Court noted that the "conflicts which federal hearing examiners seek to resolve are every bit as fractious as those which come to court." *Id.* at 513, 98 S.Ct. 2894. It did not matter that the ALJs were "employees of the Executive Branch." *Id.* at 511, 98 S.Ct. 2894. "Judges have absolute immunity not because of their particular location within the Government but because of the special nature of their responsibilities." *Id.*

The ALJ is thus not merely an alternate means of policy implementation. Rather, "the role of the modern federal hearing examiner or administrative law judge ... is 'functionally comparable' to that of a judge." *Id.* at 513, 98 S.Ct. 2894. Like the situation in *Butz*, the judges and commissioners in the FMC independently judge the evidence before them. As the *Butz* Court stated, "the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before

him, free from pressures by the parties or other officials within the agency." *Id.* Although Article I adjudication undoubtedly differs from Article III adjudication, "federal administrative law requires that agency adjudication contain many of the same safeguards as are available in the judicial process." *Id.* (citing certain requirements of the Administrative Procedure Act, 5 U.S.C. §§ 554-557).

The FMC and the United States maintain, however, that the agency adjudication is merely an empty shell because the agency itself has no enforcement power. Only the Attorney General, they emphasize, has the discretion to enforce the FMC's non-reparation orders in district court. 46 U.S.C. app. § 1713(c). This argument, however, downplays the significance of the agency's own proceeding. The FMC and the United States ignore the fact that the Commission *must* hear all complaints filed with it. *Id.* § 1710(b). The Attorney General's discretion at the back end of the process simply does not help the unconsenting state up front. *See Seminole Tribe*, 517 U.S. at 58, 116 S.Ct. 1114. Moreover, it is difficult to believe that the agency adjudication is so meaningless as to permit a private party to subject an unconsenting state to agency proceedings *because of* the adjudication's very emptiness.

It is true that under the Act, a state may choose to ignore a subpoena, an order, or a judgment. 46 U.S.C. app. § 1713(c). Yet a judgment or a subpoena against a state is a powerful thing, if not legally, then certainly politically. All parties, and certainly political entities such as states, have an interest in avoiding the stigma that attaches even to an unenforceable default judgment. Moreover, a state offends an agency that has plenary jurisdiction over its ports at its own peril. Indeed, the FMC may fine a state up to $25,000 per day for failure to comply with a Commission order. *Id.* § 1712(a). And the United States, through the Attorney General, can enforce these penalties in federal district court. *Id.* § 1712(e) (district court shall enforce the order unless it is "not regularly made or duly entered"). Furthermore, the ALJ could

order (although not force) the state to be available for depositions, to answer interrogatories, and to produce documents. That the state may choose not to comply with the order does not change the fact that the state has already suffered an indignity to its sovereignty. *See Alden*, 527 U.S. at 713, 119 S.Ct. 2240. The proverbial egg has already been broken.

Furthermore, the idea that a state would explicitly ignore any order of the federal government does not do justice to our system of federalism. State officers, no less than federal ones, take an oath to support and defend the Constitution and the laws of the United States. *Id.* at 715, 119 S.Ct. 2240. The Supremacy Clause, of course, makes it clear that state officials have a duty to obey and enforce those same laws. *See, e.g., Testa v. Katt*, 330 U.S. 386, 391, 67 S.Ct. 810, 91 L.Ed. 967 (1947) ("[T]he Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts, and the people."). In short, we cannot base our opinion on the lack of FMC enforcement power because doing so would assume that state officers are unwilling on their own to obey an order of the United States. While enforcement power may be relevant to deciding whether a legislative court possesses the "judicial power" under Article III and *Freytag*, the question of whether sovereign immunity applies depends only on whether a private party can subject an unconsenting state to an adversarial proceeding. The Shipping Act, as well as Supreme Court decisions interpreting the role of administrative judges, underscores the fact that sovereign immunity applies to this agency adjudication.*

* The United States also contends that the Supreme Court's "public rights" doctrine negates the suggestion that an agency adjudication is a judicial action. Invoking the public rights doctrine, however, does not change the fact that a private party simply cannot commence an adversarial proceeding against an unconsenting state. Moreover, even in the public rights context the Supreme Court has been skeptical of allowing Article I tribunals to exceed the constitutional jurisdiction of Article III courts. *See Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458

(Continued...)

IV.

A.

Our holding that state sovereign immunity applies to agency adjudications does not end the inquiry. The Supreme Court has identified six exceptions to the doctrine of state sovereign immunity. *See supra* Section II.B. We address each in turn.

1.

The first exception to sovereign immunity is when the state gives its consent to suit. *See, e.g., Alden*, 527 U.S. at 755, 119 S.Ct. 2240. This exception, of course, permits a state to redress the grievances of the complainant. However, it does so in a way that allows states to decide whether they want to be subject to a particular suit or class of suits. South Carolina has not given its consent to this lawsuit. It has not passed any law evincing an intent to be sued by a private party in these cases. Nor has it acquiesced to being sued in this particular case. Consequently, the consent exception does not apply to the case at bar.

2.

The second exception is for cases brought against a state by the United States or by other states. *See, e.g., id.* at 755-56, 119 S.Ct. 2240; *Principality of Monaco*, 292 U.S. at 328, 54

(...continued)

U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) (plurality opinion); *Glidden v. Zdanok*, 370 U.S. 530, 544-52, 582 S.Ct. 1459, 8 L.Ed.2d 671 (1962); *Crowell v. Benson*, 285 U.S. 225, 52 S.Ct. 285, 76 L.Ed. 598 (1932); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 15 L.Ed. 372 (1856); *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 7 L.Ed. 242 (1828). Because an Article III court would not have jurisdiction due to state sovereign immunity, these and other cases suggest that sovereign immunity would also bar Congress from permitting a federal agency to force a state to defend a claim against a private party. Thus, even in the absence of *Alden*, sovereign immunity would likely bar the FMC from adjudicating Maritime Service's complaint against the SCSPA.

S.Ct. 745. A suit "commenced and prosecuted against a State in the name of the United States ... differs in kind from the suit of an individual" in that the former was specifically contemplated in the design and framework of the Constitution. *Alden*, 527 U.S. at 755, 119 S.Ct. 2240. Suits brought by the United States require the exercise of political responsibility. *Id.* at 756, 119 S.Ct. 2240. They are less prone to be carried out solely to advance the agenda of a single individual. *Id.* Purely private suits, by contrast, lack this political constraint. The FMC and the United States argue that the discretion exercised by the Attorney General in deciding to enforce a Commission order transforms a proceeding by a private party into a discretionary action by the government. We disagree.

As previously discussed, the agency must hear all claims filed under 46 U.S.C. app. § 1710(a). It also has the ability to investigate cases upon its own motion, or upon the filing of a complaint. *Id.* § 1710(c). Indeed, under the Shipping Act and many other acts, the federal government may investigate a claim and simply bring a complaint in its own name. *See, e.g., Kimel v. Florida Board of Regents*, 528 U.S. 62, 78, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000) (an agency can bring an action against a state under the ADEA even though a private individual cannot do so); *see also EEOC v. Wyoming*, 460 U.S. 226,243,103 S.Ct. 1054, 75 L.Ed.2d 18 (1983) (agency brings suit against state under the ADEA); *EEOC v. State of Illinois*, 69 F.3d 167, 168 (7th Cir. 1995) (agency brings action against state on behalf of school teachers); *Reich v. Alabama Dept of Cons. & Nat. Resources*, 28 F.3d 1076, 1078 (11th Cir.1994) (Secretary of Labor brings action against state agency under the FLSA). In those cases, however, the named party would be the federal government, not a private party. This is not such a case. Here, a private party filed a complaint against an unconsenting state. The FMC had no choice but to adjudicate this dispute. The federal government must exercise "political responsibility for *each suit* prosecuted against a State." *Alden*, 527 U.S. at 756, 119 S.Ct. 2240 (emphasis

added). This responsibility was lacking in the case at bar. Consequently, the complaint was not brought by the federal government.

3.

The third exception to state sovereign immunity is for cases brought pursuant to Congress' enforcement power under Section Five of the Fourteenth Amendment. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 453, 96 S.Ct. 2666,49 L.Ed.2d 614 (1976); *see also Board of Tr. of the Univ. of Alabama v. Garrett*, 531 U.S. ———,121 S.Ct. 955, 968, 148 L.Ed.2d 866 (2001). The Fourteenth Amendment "required the States to surrender a portion of the sovereignty that had been preserved to them by the original Constitution" and "fundamentally altered the balance of state and federal power." *Alden*, 527 U.S. at 756, 119 S.Ct. 2240 (internal quotation marks omitted). Respondents do not contest that the Shipping Act was enacted pursuant to Congress' Article I powers, as opposed to Congress' Section Five power. Thus, this exception does not apply to the case at bar.

4.

The fourth exception is for suits brought against lesser entities like municipal corporations that are not an arm of the state. *See Aiden*, 527 U.S. at 756, 119 S.Ct. 2240. The South Carolina State Ports Authority is indisputably an arm of the state itself. *Ristow*, 58 F.3d at 1053 ("[T]he Ports Authority, from an Eleventh Amendment perspective, is the alter ego of the State of South Carolina."). Consequently, this exception is inapplicable.

5.

The fifth exception to sovereign immunity is that in certain circumstances a private party may sue state officers in their official capacity to prevent ongoing violations of the law. *See Ex parte Young*, 209 U.S. at 123, 28 S.Ct. 441; *see also*

Seminole Tribe, 517 U.S. at 73, 116 S.Ct. 1114. This exception is irrelevant to the case at bar, as the private party brought the complaint for both legal and equitable relief against the State Ports Authority itself.

6.

Finally, sovereign immunity does not prevent an individual from suing state officers in their individual capacity for ultra vires conduct fairly attributable to the officers themselves. *Alden*, 527 U.S. at 757, 119 S.Ct. 2240. This exception is likewise inapplicable to the instant case.

B.

The FMC and its amicus urge us to create another exception to sovereign immunity, however. They argue that the federal interest in uniform regulation of maritime matters is sufficient reason to deny the states sovereign immunity over matters in front of the FMC. They argue that the Constitution itself, as well as Supreme Court cases, recognize the important federal interest in maintaining "a uniformity of regulation for maritime commerce." *United States v. Locke*, 529 U.S. 89, 108, 120 S.Ct. 1135, 146 L.Ed.2d 69 (2000). In effect, the FMC and its amicus would have us hold that South Carolina consented to suits in matters affecting maritime commerce when it ratified the Constitution.

The Supreme Court in *Seminole Tribe* made clear that a strong federal interest in a particular subject matter cannot determine the application of sovereign immunity to a lawsuit. Indeed, the *Seminole Tribe* Court declared that "the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area ... that is under the exclusive control of the Federal Government." *Seminole Tribe*, 517 U.S. at 72, 116 S.Ct. 1114 *Seminole Tribe* itself involved just such a matter—the Constitution gives Congress exclusive control over the regulation of Indian commerce. *Id.* Nevertheless, "[e]ven when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting states." *Id.* Likewise, the fact that the Constitution assigns the federal government a primary role in the regulation of maritime commerce does not mean that Congress can authorize a private party to bring a complaint against an unconsenting state. Once sovereign immunity applies, the only exceptions are those recognized in *Alden*.

The federal government of course retains broad powers to regulate maritime matters. The FMC can bring a complaint in its own name. 46 U.S.C. app. § 1710(c). The FMC can, *inter alia*, bring suit in district court to enjoin conduct in violation of the Act. *Id.* § 1710(h). The FMC can investigate alleged violations of the Act upon its own initiative or upon information supplied by a private party. *Id.* § 1710(c). The FMC may issue a cease and desist order if its investigation uncovers a violation of the Act. *Id.* § 1713. "Whoever" violates the Act or an FMC order "is liable to the United States for a civil penalty." *Id.* § 1712(a). Marine terminal operators like the South Carolina State Ports Authority must "establish, observe, and enforce just and reasonable regulations and practices....." *Id.* § 1709(d)(1). The FMC can issue rules and regulations necessary to carry out the provisions of the Act. *Id.* § 1716. Indeed, if Congress so chose it could regulate all matters affecting ocean-borne commerce. U.S. Const. art. I., § 8, cl. 3; *United States v. Lopez*, 514 U.S. 549, 558, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (Commerce Clause allows direct regulation of the channels of interstate commerce).

These and other methods show that disallowing private suits against unconsenting states will not vitiate the strong federal interest in regulating maritime commerce. The fact that sovereign immunity applies to private proceedings means only that the federal government, not a private party, must vindicate the federal interest when a state is involved.

If the FMC needs more resources to ensure compliance by state agencies, Congress may of course authorize additional funds. This process ensures that any federal interest is protected in a politically accountable manner.

The FMC nevertheless argues that exempting states from having to respond to private complaints would give public maritime operators a competitive advantage over private maritime facilities. But we are not deciding this case based on maritime efficiencies or economic advantage. Rather, it is the structure of the Constitution that we are enforcing. If sovereign immunity confers upon state ports authorities some advantages that private ports authorities do not have, it is for the fundamental reason that the Constitution treats states differently. States are not just "mere prefectures or corporations." *Alden*, 527 U.S. at 758, 119 S.Ct. 2240. They are sovereign entities which by definition have certain advantages that private actors do not have. Any competitive advantage that a state might have is not enough to justify treating states in a different manner than the Constitution specifies. Moreover, in this case it is unclear whether the states will be at a competitive advantage. The federal government retains numerous enforcement powers and under the Supremacy Clause state officers must follow the Constitution and laws of the United States.

In short, the federal government itself may "deem the case of sufficient importance to take action against the State." *Alden*, 527 U.S. at 759-60, 119 S.Ct. 2240. "Congress has ample means to ensure compliance with valid federal laws, but it must respect the sovereignty of the States." *Id.* at 758, 119 S.Ct. 2240. What Congress simply cannot do under its Article I power is subject an unconsenting state to an adversarial proceeding brought by a private party.

V.

Sovereign immunity is not some outdated concept, an ancient appendage to the Constitution itself. Rather, respect

for state sovereignty enables the states to best fulfill their continuing roles and responsibilities within our federal system. Sovereign immunity applies to proceedings brought in any forum by a private party against a non-consenting state. The history, the text, and the structure of the Constitution confirm that under its Article I powers, Congress cannot authorize private parties to haul unconsenting states before the adjudicative apparatus of federal agencies and commissions.

"The founding generation thought it 'neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons.'" *Alden*, 527 U.S. at 748, 119 S.Ct. 2240 (quoting *In re Ayers*, 123 U.S. 443, 505, 8 S.Ct. 164, 31 L.Ed. 216 (1887)). To hold otherwise would destroy the delicate equilibrium that is dual sovereignty.

For the foregoing reasons, the judgment of the Federal Maritime Commission is reversed and the case is remanded with directions to dismiss it.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

APPENDIX B

March 23, 2000

FEDERAL MARITIME COMMISSION

DOCKET NO. 99-21

SOUTH CAROLINA MARITIME SERVICES, INC.

v.

SOUTH CAROLINA STATE PORTS AUTHORITY

ORDER REVERSING THE ADMINISTRATIVE LAW JUDGE'S ORDER AND REMANDING FOR FURTHER PROCEEDINGS

BY THE COMMISSION: *(Harold J. Creel, Jr., Chairman; Joseph Brennan, Antony M. Merck, John A. Moran, and Delmond J.H. Won, Commissioners)*

BACKGROUND

This proceeding began with the filing of a complaint before the Federal Maritime Commission ("Commission" or "FMC") on October 25, 1999, by South Carolina Maritime Services, Inc. ("Maritime Services"), a South Carolina corporation engaged in the operation of passenger vessels, against the South Carolina State Ports Authority ("SCSPA"). In its complaint, Maritime Services asserted that SCSPA refused to give berthing space at Charleston, South Carolina, to Maritime Services' vessel, the M/V TROPIC SEA, which permits gambling activities on board when the vessel is in international waters. The denial of berthing space was due

to SCSPA's purported policy of refusing to berth ships whose primary purpose is gambling. Maritime Services averred that SCSPA did provide berthing to another cruise operator, Carnival Cruise Lines, whose vessel, the M/S INSPIRATION, allegedly provided gambling services. Because of this apparently disparate treatment, Maritime Services claimed that SCSPA violated section 10(b)(10) of the Shipping Act of 1984 ("Shipping Act"), 46 U.S.C. app. § 1709(b)(10), by unreasonably refusing to deal, and section 10(d)(4), 46 U.S.C. app. § 1709(d)(4), by unduly and unreasonably preferring Carnival, and unduly and unreasonably prejudicing or disadvantaging Maritime Services. Maritime Services asked for a cease and desist order and for compensation for "actual injuries caused by [SCSPA]'s discriminatory practices, as well as interest and reasonable attorneys fees." Complaint at 10.

On November 16, 1999, SCSPA filed an Answer to the Complaint. In its Answer, SCSPA raised the affirmative defense that "[t]he Eleventh Amendment of the U.S. Constitution prohibits suits by private parties for reparations against" a state agency like SCSPA. Answer at 8.

The case was assigned to Chief Administrative Law Judge Norman D. Kline ("ALJ"). Reviewing a motion to dismiss filed by SCSPA and Maritime Services' response, the ALJ dismissed the case based on his belief that SCSPA, as an arm of the State of South Carolina, is immune from complaint proceedings brought before the Commission under the doctrine of sovereign immunity. On February 2, 2000, the Commission, on its own motion, determined to review the ALJ's decision to dismiss the case. For the reasons set forth below, we believe the ALJ erred, and therefore reverse his decision and remand the case for further proceedings.

PROCEEDINGS BEFORE THE ALJ

After filing its Answer, SCSPA filed a Motion to Dismiss, alleging several grounds for dismissing the complaint. Of these, the ALJ considered and based his ruling only upon SCSPA's argument that it is an agency of the State of South Carolina and therefore immune from suit by private parties under the doctrine of sovereign immunity. Motion at 14-17.

In its Response to the Motion to Dismiss, Maritime Services addressed the various grounds for dismissal, and averred, *inter alia*, that SCSPA is not immune from suit under the doctrine of sovereign immunity. Response at 8-9.

On January 5, 2000, the ALJ granted the Motion to Dismiss, explaining that "recent Supreme Court decisions interpreting the 11th Amendment and State sovereign immunity from private suits plus a decision by the U.S. Court of Appeals for the Fourth Circuit holding that SCSPA is an 'arm of the State' and therefore entitled to the 11th Amendment immunity from private suits require that the instant complaint be dismissed." ALJ Order at 11.[1] He went on to hold that the only method for the Commission to inquire into the alleged violations of the Act in this case would be by Commission-initiated investigation.

DISCUSSION

Neither party appealed the ALJ's decision to the full Commission. Ordinarily, when no party files an appeal from an ALJ's decision to dismiss a case, the ALJ's ruling becomes the Commission's decision 30 days after its issuance, under Rule 227(c), 46 C.F.R. § 502.227(c). However, given the importance of the sovereign immunity question to the Commission's ability to determine whether state-operated ports are acting in compliance with the provisions of the Shipping Act, we decided to review the ALJ's ruling. Because the ALJ dismissed the complaint on sovereign immunity jurisdictional grounds, it is necessary for the

[1]The Fourth Circuit case referred to by the ALJ is *Ristow v. South Carolina State Ports Authority*, 58 F.3d 1051 (4th Cir. 1995).

Commission to determine whether such dismissal was correct — in other words, whether state sovereign immunity from private suits extends to proceedings before this agency.[2]

A. *The Doctrine of Sovereign Immunity*

In 1793, the U.S. Supreme Court ruled that Article III of the Constitution permitted a private citizen of another state to sue the State of Georgia in court without its consent. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). The Eleventh Amendment was passed shortly thereafter, with the purpose of overturning the Court's determination in *Chisholm*. *See generally Alden v. Maine*, 119 S.Ct. 2240 (1999) (discussing the history of the ratification of the Eleventh Amendment). The explicit language of the Amendment forbids a citizen of one state from suing another state without that state's consent. The Amendment says that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens *of another State*, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI (emphasis added). However, in *Hans v. Louisiana*, 134 U.S. 1 (1889), the Court ruled that the doctrine of state sovereign immunity extends beyond the linguistic boundaries of the Eleventh Amendment, and forbade a suit against a state by

[2]It is clear that the SCSPA is a "person" under 46 U. S.C. app. § 1702, and thus subject to the Shipping Act's requirements. In *California v. United States*, 320 U.S. 577, 585-6 (1944), the Supreme Court ruled, under identical language in the Shipping Act's predecessor statute (the Shipping Act, 1916), that "with so large a portion of the nation's dock facilities ... owned or controlled by public instrumentalities, it would have defeated the very purpose for which Congress framed the scheme for regulating waterfront terminals to exempt those operated by governmental agencies." *See also Reno v. Condon*, 120 S.Ct. 666 (2000) (Federal government may regulate commercial activities of state entities).

a citizen of that same state in Federal court in a case involving a question of Federal law. Subsequent decisions also "rejected similar requests to conform the principle of sovereign immunity to the strict language of the Eleventh Amendment." *Alden*, 119 S.Ct. at 2254. "These holdings reflect a settled doctrinal understanding, consistent with the views of the leading advocates of the Constitution's ratification, that sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself." *Id.* Thus, our discussion here is not limited to the text of the Eleventh Amendment, but rather addresses the broader doctrine of sovereign immunity, as it has been developed and enunciated by the Supreme Court.

Based on his reading of numerous Supreme Court cases, the ALJ held that "it is irrational to argue that an agency like the Commission ... is free to disregard the 11th Amendment or its related doctrine of State immunity from private suits." ALJ Order at 20. He also ruled that there is "no significance to an argument that the doctrine of 11th Amendment State sovereign immunity from private suits does not extend to administrative proceedings." *Id.*

However, the Supreme Court has defined the terms of state sovereign immunity, and this definition does not extend to administrative proceedings. All of the recent Supreme Court cases addressing state sovereign immunity involve proceedings against states in judicial tribunals, not before administrative agencies. In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the Court held that the Indian Commerce Clause does not grant Congress the authority to abrogate a state's sovereign immunity from suit in Federal district court under the Indian Gaming Regulatory Act. The Court specifically limited its inquiry to the issue of whether Congress could "expand the jurisdiction of the Federal courts beyond the bounds of Article III" of the Constitution. *Id.* at 65. The Court's discussion in *Seminole Tribe* is limited to the subject of district court

jurisdiction over states, and no mention of or analogy to administrative proceedings is made.[3]

In *Alden*, the Court ruled that the Constitution's Interstate Commerce Clause does not grant Congress the authority to subject nonconsenting states to private suits for damages in state courts under the Fair Labor Standards Act.[4] The Court noted that the "separate and distinct structural principle" of sovereign immunity "is not directly related to the scope of the judicial power established by Article III, but inheres in the system of federalism established by the Constitution." *Alden*, 119 S.Ct. at 2255. The Court also stated that it has "often described the States' immunity in sweeping terms, without reference to whether the suit was prosecuted in state or federal court." *Id.* at 2262. While the Court recognized that sovereign immunity arises from the "system of federalism," and not from the mere text of the Eleventh Amendment, it nevertheless described such immunity only in terms relating to the possibility of "suit ... in state or federal court." *Id.* The remainder of the recent sovereign immunity cases address suits in Federal court. *See College Savings Bank v. Florida Prepaid Postsecondary Education Expense Bd.*, 119 S.Ct. 2219 (1999) (Congress cannot seek constructive waivers of sovereign immunity from states for suit in Federal court under the Trademark Remedy Clarification

[3]A recent circuit court opinion, rendered after *Seminole Tribe*, agrees with this analysis. *See Premo v. Martin*, 119 F.3d 764, 769 (9th Cir. 1997), *cert. denied*, 522 U.S. 1147 (1998) ("the Amendment on its face limits only the authority of Article III courts."). Cases decided before *Seminole Tribe* reached similar results. *See, e.g., Ellis Fischel State Cancer Hospital v. Marshall*, 629 F.2d 563 (8th Cir. 1980), *cert. denied*, 450 U.S. 1040 (1981) ("Petitioner, however, cites no case law for the proposition that the eleventh amendment is any bar to administrative action, and we reject that position. The eleventh amendment bars judicial action, not action by Congress or the executive branch.").

[4]The Court characterized the issue of whether the Federal government can abrogate state sovereign immunity from suit in the state's own courts as "a question of first impression." *Alden*, 119 S.Ct. at 2260.

Act/Trademark Act of 1946); *Florida Prepaid Postsecondary Education Expense Bd. v. College Savings Bank*, 119 S.Ct. 2199 (1999) (Congress lacks authority under section 5 of the Fourteenth Amendment to abrogate state sovereign immunity from suit in Federal court under the Patent and Plant Variety Protection Remedy Clarification Act); *Kimel v. Florida Bd. of Regents*, 120 S.Ct. 631 (2000) (Congress lacks authority under section 5 of the Fourteenth Amendment to abrogate state sovereign immunity from suit in Federal court under the Age Discrimination in Employment Act). *See generally The Supreme Court-Leading Cases*, 113 Harv. L. Rev. 200-233 (1999).

The doctrine of state sovereign immunity, even freed from the linguistic boundaries of the Eleventh Amendment, is meant to cover proceedings before judicial tribunals, whether Federal or state, not executive branch administrative agencies like the Commission. There is no compelling reason offered by either the ALJ or SCSPA to extend the reach of the Supreme Court's holdings in *Seminole Tribe* and *Alden*, and thereby nullify the Commission's jurisdiction over state ports, which jurisdiction has been in place for decades. The Shipping Act of 1984, and the Shipping Act, 1916[5] before it, illustrate Congress's decision that the regulation of ports, whether publicly or privately owned, is essential to protecting the nation's oceanborne commerce. Commission jurisdiction over complaint cases brought against ports is one of the agency's primary means of regulating ports. Accordingly, the Commission has in the past rebuffed attempts to restrict its jurisdiction over public port authorities. *See, e. g., James J. Flanagan Shipping Corporation d/b/a James J. Flanagan*

[5]The Shipping Act, 1916, which was replaced in most respects by the Shipping Act of 1984, was the statute the Commission and its predecessor agencies administered for decades. *See supra* at 4-5 n.2. The provisions of the 1916 Act not replaced by the passage of the 1984 Act were subsequently abolished by the Interstate Commerce Commission Termination Act, Pub. L. No. 104-88, 109 Stat. 8033 (1995).

Stevedores v. Lake Charles Harbor and Terminal District and Lake Charles Stevedores, Inc., 27 S.R.R. 1123, 1130 (1997) ("that the Port presumably acts in the public interest does not shield it from the Commission's scrutiny.").

A private cause of action against an arm of the state brought before an administrative agency, because it invokes the remedial powers of the Executive branch, is in many respects more analogous to a Federal investigation than it is to a suit brought by a private party before a Federal or state court. For instance, section 11(b) of the Shipping Act provides that if a complainant in a Commission proceeding "is not satisfied, the Commission shall investigate [the complaint] in an appropriate manner and make an appropriate order." 46 U.S.C. app. § 1710(b). The Commission is also authorized to initiate investigations on its own motion, as a further weapon in its regulatory arsenal. Commission investigations, and private complaint proceedings, are part of a unified system of regulation created by Congress under the Shipping Act. It is important to note that the complaint case, as a regulatory tool, is not fungible with the right to file suit against a party in court. *See National Fuel Gas Supply Corp. v. Federal Energy Regulatory Comm'n*, 59 F.3d 1281 (D.C. Cir. 1995) (agency adjudications are not Article III court proceedings); *Chavez v. Director, Office of Workers Compensation Programs*, 961 F.2d 1409 (9th Cir. 1992) (same); *Ecee, Inc. v. Federal Energy Regulatory Comm'n*, 645 F.2d 339 (5th Cir. 1981) (same); *see also Tennessee Dept of Human Services v. U.S. Dept of Education*, 979 F.2d 1162 (6th Cir. 1992) (Eleventh Amendment does not apply to administrative agencies). A private complainant may not bring court action regarding alleged violations of the Shipping Act, as the FMC's jurisdiction over any such alleged violations is exclusive. *See Government of Guam v. American President Lines*, 28 F.3d 142 (D.C. Cir. 1994) (no implied private cause of action in court under the Shipping Act, 1916); *see also D.L. Piazza Co. v. West Coast Line, Inc.*, 210 F.2d 947 (2nd Cir.), *cert. denied*, 348 U.S. 839 (1954). This further emphasizes the unitary nature of the regulatory scheme created by the Shipping Act, as all original

determinations as to whether the Act has been violated, whether initiated by private complaint or by Commission investigation, are made by the Commission.[6]

For these reasons, we have chosen to reverse the ALJ's decision dismissing the present case, and hold that the doctrine of sovereign immunity does not bar complaints against state-run ports.[7]

B. *Whether Commission Reparations Awards are Enforceable*

The ALJ also noted that "the Commission cannot enforce its orders without the aid of the federal courts," and that, under sovereign immunity grounds, such enforcement might be impossible. ALJ Order at 21. It is true that, under section 14(d) of the Shipping Act, a party which has secured a reparations award by Commission order may "seek enforcement of the order in a United States district court having jurisdiction of the parties." 46 U.S.C. app. § 1713(d). The ALJ appears to have concluded that such enforcement would be impossible because, even if the Commission retained jurisdiction over a state-operated port, a district court would not have jurisdiction to order the enforcement of a reparations award. The ALJ assumed that the port would enjoy sovereign immunity from an enforcement proceeding. For this reason, the ALJ wondered, "what federal court would take jurisdiction of a private suit for enforcement of a reparations award that would have to be paid out of the State treasury?" ALJ Order at 21 n.8.

We note that review of the Commission's determinations awarding reparations to private complainants against state

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[6] *C.f., United States v. Locke*, 120 S.Ct. 1135 (2000) (recognizing a Federal interest in maintaining "a uniformity of regulation for maritime commerce.").

[7] Because it is not necessary to a resolution of the sovereign immunity question, we express no opinion regarding whether SCSPA is in fact an arm of the State of South Carolina.

port authorities is available in the courts of appeals pursuant to the Hobbs Act, 28 U.S.C. § 2342. Such review is not an initial suit by a citizen against a state under Article III, and is not a situation in which sovereign immunity would be implicated. Entities like SCSPA, if found by the Commission to be in violation of the Shipping Act, may petition the courts of appeals for review. The courts of appeals retain jurisdiction "to determine the validity of" orders issued by the Commission. 28 U.S.C. § 2342. The determination of the validity of a Commission order is a review of administrative action, not a suit against a state. *See, e.g., Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) (setting forth the standards for review of an agency's interpretation of the statute it administers). Sovereign immunity would not preclude appellate review of a Commission order.

The possibility of bringing a cause of action against a port in district court to enforce a reparations award may be said to be analogous to Hobbs Act review in the courts of appeals. The role of the district court, pursuant to section 14 of the Shipping Act, is to permit a party holding a reparations award to seek "enforcement" of the order. Section 14 states that "the findings and order of the Commission shall be prima facie evidence of the facts therein stated." Such a proceeding is thus not an original *suit* against a state entity implicating Article III jurisdictional authority, but instead, like Hobbs Act review in the courts of appeals, is court *review* of a Federal agency's order.[8]

[8]The Hobbs Act specifies that the petition for review is against the United States. 28 U.S.C. § 2344. While a district court enforcement proceeding to secure a reparations award would not be captioned as an action against the United States, it would nevertheless constitute review of agency action. Furthermore, the existence of the district court enforcement avenue appears to have originated not as a method of review intended to create a "suit" against an adverse party. Rather, it arose from sections 30-31 of the Shipping Act, 1916, as a means of protecting a shipper's choice of venue in actions against a common carrier, when the shipper required court review of the agency's determination. *See Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 613-15 (1966); *Interstate Commerce Comm'n v. Atlantic Coast Line R.R.*, 383 U.S. 576 (1966).

Thus, we believe that Commission reparations awards are enforceable against entities like SCSPA.

However, even if a court were to rule that a Commission reparations award is unenforceable, the issuance of an order finding violations of the Shipping Act is not futile. The Commission must be able to determine whether the actions of regulated entities like SCSPA violate the Shipping Act. Whether or not a complainant is able to collect on a reparations award is a separate issue, distinct from the Commission's obligation to pass judgment on the legality of allegedly unreasonable or otherwise prohibited actions. Also, Commission decisions in complaint cases, whether or not a reparations award is issued, serve as precedent in future complaint cases and investigations.

It is also important to note that not all "state" port instrumentalities are in fact arms of the state. Whether they are is a determination made on a case-by-case basis. *See* 13 Wright, Miller and Cooper, *Federal Practice and Procedure*, section 3524. *See also Jacintoport Corp. v. Greater Baton Rouge Port*, 762 F.2d 435 (5th Cir. 1985) (port not entitled to sovereign immunity); *Principe Compania Naviera, SA v. Board of Commissioners of the Port of New Orleans*, 333 F.Supp. 353 (E.D. La. 1971) (same).

CONCLUSION

The Commission has determined to reverse the ALJ's Order, and rule that the doctrine of state sovereign immunity does not bar Maritime Services' claim against SCSPA. We remand the case to the ALJ for a determination on the merits of: (1) SCSPA's other grounds arguing for dismissal of the proceeding and, if the case is not dismissed, (2) Maritime Services' substantive claims of violations of the Shipping Act.

THEREFORE, IT IS ORDERED, That the ruling of the Administrative Law Judge dismissing the complaint in this proceeding is reversed; and

IT IS FURTHER ORDERED, That this proceeding is remanded to the Administrative Law Judge for further action consistent with this Order.

By the Commission.

/s/
Bryant L. VanBrakle
Secretary

APPENDIX C

January 5, 2000

FEDERAL MARITIME COMMISSION
WASHINGTON, D. C.

DOCKET NO. 99-21

SOUTH CAROLINA MARITIME SERVICES, INC.

v.

SOUTH CAROLINA STATE PORTS AUTHORITY

MOTION OF RESPONDENT SOUTH CAROLINA STATE PORTS AUTHORITY TO DISMISS COMPLAINT GRANTED

Norman D. Kline, Administrative Law Judge.

The Complaint and Answer

By complaint served on October 27, 1999, complainant South Carolina Maritime Services, Inc. (Maritime Services) alleges that it is a South Carolina corporation that charters a passenger ship known as the M/V TROPIC SEA, that flies the flag of the Bahamas. Maritime Services alleges that this ship is a passenger vessel having six decks, five of which are designated for passenger access, three of which (the A, D, and E decks) contain passenger staterooms. Besides buffet tables and restaurant, gift shop, lounge with bar and swimming pool, and facilities for officers and crew, the M/V TROPIC SEA allegedly contains a small casino on Deck B

and a main casino on Deck C. Maritime Services alleges furthermore that it intends to offer "passenger cruises" from the Port of Charleston sometimes to nowhere and sometimes to the Bahamas. Maritime Services also alleges that it offers numerous activities for its passengers, including dining service and entertainment such as dancing, live musicals, piano bar, and live band. However, it also alleges that it offers "bingo, casino games, and various games for the passengers' children" but maintains that passengers may enjoy casino gambling only "while the vessel is in international waters." In this regard, it is alleged, "[g]ambling operations will only be conducted while the vessel is in international waters, and will not occur in South Carolina waters." Complainant alleges that it "is a common carrier engaged in the business of providing transportation of passengers for hire."

Maritime Services alleges that respondent South Carolina State Ports Authority (SCSPA) has refused to give it berthing space at Charleston, citing five specific letters of rejection received from SCSPA between December 1998 and August 1999, which denied berthing because of a city ordinance or South Carolina laws and SCSPA's "policy" of refusing berthing to ships whose "primary purpose is gambling." Notwithstanding such "policy," it is alleged, SCSPA did provide berthing for another cruise operator, Carnival Cruise Lines, who advertised overnight "cruises to nowhere" aboard the M/S INSPIRATION, an oceangoing passenger vessel flying the flag of Panama and containing a casino featuring "slot machines, blackjack, roulette, Caribbean stud poker, wheel of fortune, bingo, and MegaCash, advertised by Carnival "as the world's largest cruise ship jackpot." Like complainant's ship, it is alleged that for its "cruises to nowhere" Carnival "provided gambling activities to the passengers while the vessel was in international waters." Maritime Services alleges furthermore that SCSPA berthed Carnival's ship that boarded passengers on May 28 and September 11, 1999, that Carnival has advertised further cruises departing Charleston on October 7,1999, and future cruises to depart in May and October 2000, that

SCSPA charged Carnival relevant port tariff charges under SCSPA's tariff and has agreed with Carnival to provide berthing to Carnival's ship.

Because of the foregoing alleged conduct, Maritime Services alleges that SCSPA has unreasonably refused to deal or negotiate with it, in violation of section 10(b)(10) of the Shipping Act of 1984 and has unduly and unreasonably preferred Carnival and unduly and unreasonably prejudiced or disadvantaged complainant, in violation of section 10(d)(4) of the 1984 Act. Complainant asks for an order compelling SCSPA to cease and desist from the aforesaid alleged violations, to order lawful and reasonable practices, and to compensate complainant "for its actual injuries caused by the Ports Authority's discriminatory practices, as well as interest and reasonable attorney's fees." Complainant alleges such injuries to include but not to be limited to "loss of profits, loss or earnings, loss of sales, and loss of business opportunities." Finally, complainant asks "[t]hat this Commission award Maritime Services such other and further relief as is just and proper."[1]

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[1]Complainant also asks that the Commission file suit in the U.S. District Court for the District of South Carolina, Charleston Division, in order to obtain a temporary restraining order and preliminary injunction against SCSPA. Complainant cites "Section 1710(h) of the Shipping Act..." (Para. 33, complaint.) SCSPA opposes this particular request, citing the fact that complainant has the right to seek its own injunction in federal court pursuant to section 11(h)(2) in aid of its own complaint whereas the Commission can seek such injunction in court pursuant to section 11(h)(1) of the Act in aid of a Commission-instituted investigation, which the instant proceeding is not. (Answer, para. 33, and SCSPA's Motion to Dismiss at 10-11.) After I advised complainant that it had the right to seek its own injunction in federal court under section 11(h)(2), complainant's counsel advised that "it is likely that our client will seek an injunction pursuant to sec. 11(h)(2)." (Letter dated November 11, 1999, from complainant's counsel to the presiding judge.) In view of the SCSPA's argument that it is entitled to immunity from *private* suits "as an arm of the State" under the 11th Amendment to the Constitution, it is doubtful if any federal court would have jurisdiction to issue such an injunction, as will be made more clear in my discussion of the 11th Amendment and State sovereign immunity doctrine below.

SCSPA admits a number of factual allegations made by Maritime Services when it has information to confirm the allegations, such as the allegation that SCSPA is "a political agency, entity, body and/or subdivision of the State of South Carolina," that it has rejected Maritime Services' repeated requests for berthing at Charleston because of state or local laws or ordinances and a "policy" regarding gambling ships, and that it has berthed Carnival's ship at Charleston, at least in September 1999. However, SCSPA denies any agreement with Carnival or that Carnival's ship is primarily one designed for gambling like complainant's. SCSPA states in its answer to the complaint that "[w]ith regard to future cruises by any cruise line or other entity, the SPA denies that it will accommodate any vessel that offers a cruise, the primary purpose of which is to promote gaming."

Aside from the particular denials by SCSPA, the main thrust of SCSPA's answer is that Maritime Services is attempting wrongfully to invoke the Commission's jurisdiction because "Congress, through the Johnson Act, has specifically determined not to preempt state laws prohibiting and regulating gaming activities within their borders, including port calls by gaming vessels." SCSPA argues that the State of South Carolina prohibits "gambling junkets, and the SPA will not permit its cruise facilities to be used to provide such services. Rather, the SPA's policy allows cruise ships to use its facilities only where gaming activities are not the primary purpose of the cruise." Several times in its answer SCSPA indicates that it will deny its facilities to cruise ships having gambling devices on board and will do so "even where the primary purpose of the cruise is not gambling" if necessary to eliminate alleged discrimination.[2] Moreover, SCSPA offered

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[2]On page one of its answer, SCSPA states that "should any determination be made to the contrary [i.e., that SCSPA has unlawfully discriminated] the SPA will deny facilities to all vessels departing from and returning to Charleston for short-term 'cruises to nowhere' with gambling devices on board, even

(continued...)

five affirmative defenses relating mainly to its contention that the Commission has no jurisdiction over the complaint because of a particular statute and the 11th Amendment to the Constitution. SCSPA also argues that SCSPA's actions are based upon the proper exercise of the police power of the State of South Carolina and contends that "Maritime Services is not a common carrier within the meaning of the Shipping Act of 1984." In its Answer to the complaint SCSPA promised to file a motion to dismiss on these grounds and three days later, it did.

SCSPA's Motion to Dismiss

In its Motion to Dismiss SCSPA has launched a massive attack on the complaint based on a number of arguments, several of which are jurisdictional in nature while others pertain more to complainants standing and the merits of its factual allegations. Two of the arguments relate to the Constitution or to a particular statute. Thus, SCSPA argues that it is a State agency and is therefore immune under the 11th Amendment to the Constitution from being sued by *private* parties either in federal courts or before the Commission. SCSPA cites recent Supreme Court decisions, such as *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *College Sav. Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 119 S. Ct. 2219 (1999); and *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993).

(...continued)
where the primary purpose of the cruise is not gambling." On page six of its answer, at para. 27., SCSPA states that "[w]ith regard to future cruises by any cruise line or other entity, the SPA denies that it will accommodate any vessel that offers a cruise, the primary purpose of which is to promote gaming." On page 8 of its answer, SCSPA states that "if the Commission determines that the complaint states a claim cognizable under the Shipping Act, the SPA will take appropriate remedial measures to eliminate any perceived discrimination or undue preference, as described on page 1 of this Answer."

A second argument by SCSPA of a jurisdictional nature is that Congress has reserved the matter of regulation of gambling ships to the States. SCSPA cites the Johnson Act, 15 U.S.C. sec. 1175, and argues that this Act shows that Congress intended to defer to State law with respect to control of gambling devices on ships. SCSPA cites *Casino Ventures v. Stewart*, 183 F. 3d 307 (4th Cir. 1999), in which the court held that the State of South Carolina could lawfully control gambling on ships even beyond State territorial waters under its own laws which were not preempted by the Johnson Act and, indeed, that Congress intended to extend, not curb State police power in this field. Continuing in this vein, SCSPA argues that complainant's ship is not a cruise ship at all but is classified as a "ferry," cannot provide accommodations for all its passengers, and has, as her primary purpose, gambling, therefore differing significantly from the Carnival cruise ship that SCSPA is accused of unlawfully preferring. SCSPA contends that complainant is making a "transparent attempt to circumvent the Johnson Act" and argues that complainant "seeks Commission review of state law and policy in an area that Congress has specifically left to South Carolina." (SCSPA's Motion at 8.) SCSPA therefore concludes that "the proper forum for the interpretation of South Carolina law in areas expressly reserved to the states is in a South Carolina state court." (*Id.*) SCSPA also cites a number of South Carolina anti-gambling statutes and a City of Charleston Ordinance Sec. 21-179, which it claims to authorize its conduct.

SCSPA's other arguments relate somewhat to the Commission's jurisdiction under the Shipping Act but also go to the merits of complainant's allegations of violations of that Act. Thus, SCSPA argues that complainant cannot seek relief from the Commission because allegedly complainant has failed to comply with federal law regulating cruise lines, a law that the Commission administers. Moreover, SCSPA argues that it is not a marine terminal operator as regards complainant's ship because complainant is not a common carrier by water and furthermore the Commission does not regulate everything that a marine terminal operator does even if SCSPA is a regulated marine terminal operator, especially when the activity in question involves a non-common carrier that SCSPA believes complainant to be.[3]

Complainant's Response to the Motion to Dismiss

In its Response, Maritime Services contends that SCSPA "has engaged in a pattern of discriminatory practices in its role as marine terminal operator in the Port of Charleston, South Carolina...." (Response at 1.) Maritime Services reiterates the allegations in its complaint that SCSPA has unlawfully discriminated against it by denying its ship berthing at Charleston but allowing another cruise line, Carnival, to berth at Charleston, although, like complainant, Carnival allegedly offers "cruises to nowhere" on ships that provide gambling. Complainant contends that the various South Carolina statutes cited by SCSPA do not apply to its operations and that one South Carolina court has so held regarding another cruise operator. Complainant also contends that the 1984 Act "clearly vests the Commission with authority to investigate and direct payment of reparations, as well as to subsequently file suit for injunctive relief against marine terminal operators-such as the Ports Authority-who fail to abide by the provisions of the Shipping Act." (Complainant's Response at 2.) Complainant contends that SCSPA is not immune from an action taken by the Commission under the 11th Amendment to the Constitution,

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[3]SCSPA also argues that the complaint is unverified and that "[t]his failure alone is sufficient to support dismissal." (SCSPA's Motion at 17.) If this were true, it would amount to a technical violation which could easily be cured. See *Gillen's Sons Lighterage v. American Stevedores*, 10 S.R.R. 195 (ALJ 1968); 12 F.M.C. 325, 331 n. 6 (1969). However, the complaint has a "Verification" signed by Frank Guarino, President of Maritime Services, Inc. that is sworn and subscribed before a Notary Public. See "Exhibit F" attached to Complainant's Response to Respondent's Motion to Dismiss.

that Maritime Services qualifies as a common carrier by water and that it has complied with applicable laws requiring certification of financial responsibility.

Complainant's Focus on SCSPA's Enforcement of South Carolina Law

Although perhaps not always completely consistent, Maritime Services' contends that it is not contesting the constitutionality of the underlying South Carolina laws on which SCSPA claims to justify its policy of denying berthing to complainant's ship. Instead, Maritime Services argues that it is challenging SCSPA's alleged discriminatory *enforcement* of this policy. In complainant's own words: (Complainant's Response at 4.)

> In actual fact, Maritime Services is unconcerned with the Constitutionality of the underlying laws which the Ports Authority cites as authority for its decision not to allow the M/V TROPIC SEA to berth at its facilities. Again, at least one South Carolina court reaching the issue has held squarely that these statutes do not apply to the "cruise to nowhere" activities which Maritime Services has proposed to undertake. (Case citation omitted.) *This action is a complaint about the Ports Authority's unreasonable and discriminatory enforcement of its policies, not a complaint about the policies themselves. It is the Ports Authority's discriminatory berthing practices that serve as the basis of Maritime Services' complaint and the intended focus of Federal Maritime Commission action.* (Emphasis added except for the word "enforcement".)

Having stated that Maritime Services is not challenging the South Carolina laws (which it deems not to be applicable anyway) nor the alleged "policy" that SCSPA claims to be supported by these laws, nevertheless Maritime Services

states that SCSPA is wrong to follow such "policy" when dealing with individual carriers applying for berths. Instead, Maritime Services contends that SCSPA should have decided whether to berth any particular carrier strictly on "transportation and economic conditions" and not on "moral considerations which are completely unrelated to transportation or economic conditions." (Response at 5-6.) Maritime Services contends therefore that "the Port Authority's decision to prohibit the M/V TROPIC SEA from docking at the Ports Authority's terminal is based on impermissible considerations." (*Id.* at 6.)

Complainant's Supplementation to Its Response

In lieu of conducting a formal prehearing conference, I instructed complainant to clarify several matters in order that I not misunderstand its arguments before ruling on the SCSPA's Motion. (See Order to Supplement the Record, December 9, 1999.) In particular, I requested clarification on three matters: 1) the effect of the City of Charleston Ordinance Sec. 21-179 that appears to deal with gambling ships at Charleston and that was cited by SCSPA but which complainant had not addressed; 2) whether complainant was attacking the underlying South Carolina laws or their enforcement by SCSPA; and 3) how complainant intended to prove its allegations of "undue" or "unreasonable" conduct by SCSPA within the meaning of the Shipping Act. The last matter would be relevant to the conduct of the case assuming that the complaint was not dismissed. In response to my inquiries, complainant furnished the following answers: 1) City of Charleston Ordinance Sec. 21-179 has not been interpreted by a South Carolina court but, in any event, neither South Carolina law enforcement officials nor the City of Charleston enforce the Ordinance against cruise ships and SCSPA is not authorized to enforce the Ordinance. Moreover, ". . . Complainant respectfully suggests that antigambling laws or ordinances are not before this Commission." (Complainant's Supplementation at 2.) However, states com-

plainant, "the City of Charleston Ordinance, if considered, would premise berthing decisions on factors other than purely transportation or economic considerations. The Shipping Act prohibits that consideration." (*Id.* at 3.) This answer overlaps with the next one.

2) Complainant states that it is not attacking the constitutionality of South Carolina statutes or the Charleston Ordinance and states that "[t]hat determination is for another forum." *(Id. at* 3.) However, complainant states that it is attacking SCSPA's alleged "policy" of barring only complainant's ship from Charleston and its "discriminatory enforcement." (*Id.*) Thus complainant argues that should the SCSPA's "policy" (which SCSPA contends to be based on South Carolina laws) be upheld, complainant "asks the Commission to prohibit SCSPA from continuing to discriminate against Complainant while allowing its competitors to berth and engage in the identical activity." (*Id.*) In any event complainant contends that the South Carolina laws cited by SCSPA "are all ultimately inapplicable to this proceeding." (*Id.* at 4.)

3) Complainant states that it was not aware of the Commission's rule requiring complainants to commence discovery with the filing of their complaints but that it "intends to participate in full discovery in order to resolve issue of fact in this action." (*Id.* at 4.) However, complainant also states that it "intends to work with counsel for the Ports Authority for the purpose of arriving at stipulations of fact so that the case may be decided in an expeditious manner." *(Id.)*

Whether Maritime Services is challenging SCSPA's alleged discriminatory conduct among cruise ship operators or challenging an underlying State or City "policy" or State or City laws, as I explain below, the problem is that SCSPA is an "arm" of the State of South Carolina and therefore enjoys immunity from being sued by "private" persons either in courts or before administrative agencies.

Consequently, as I also mention below, if there is merit to Maritime Services' allegations that SCSPA is discriminating among cruise ship operators without any justification recognized by the Shipping Act, the merit of such allegations would have to be determined by a procedure instituted by the Commission itself, whether informal or formal.

DISCUSSION AND CONCLUSIONS

As discussed above, respondent SCSPA has raised several arguments in asking that the instant complaint be dismissed. The first two relate to the Commission's jurisdiction while the others involve consideration of the merits of the alleged unlawful discrimination. I find, however, that the recent Supreme Court decisions interpreting the 11th Amendment and State sovereign immunity from *private* suits plus a decision in the U.S. Court of Appeals for the Fourth Circuit holding that SCSPA is an "arm of the State" and therefore entitled to the 11th Amendment immunity from *private* suits require that the instant complaint be dismissed. If there is merit to complainant's allegations that SCSPA has unlawfully discriminated and unreasonably refused to deal with complainant in violation of sections 10(d)(4) and 10(b)(10) of the 1984 Act, respectively, Maritime Services' allegations and request for remedial orders would have to be considered by the Commission in the form of a Commission-instituted investigation, whether formal or informal, because the doctrine of State sovereign immunity does not extend to proceedings against the States brought by the superior federal sovereign acting through its agent, the Federal Maritime Commission.

In recent years the Supreme Court has been elevating the doctrine of State sovereign immunity from *private* lawsuits to new heights and has even held various attempts of Congress to regulate State entities under the Interstate and Indian Commerce Clause of the Constitution (Article 1, sec. 8, cl. 3) to be beyond Congress's power. The first of

these recent Supreme Court decisions was issued in 1996, namely, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44. In that case the court held that Congress could not abrogate State sovereign immunity from *private* suits under the Constitution. Prior to 1996 no State-run entity against which a complaint had been filed with the Commission had argued that the complaint had to be dismissed on 11th Amendment grounds. Indeed, it had always been believed that any person could file a complaint against State-run marine terminal operators that enjoyed no special privileges under the Shipping Act merely because they were operated by States. The Supreme Court had so held in the leading case of *California v. United States*, 320 U.S. 577 (1944), a case involving a Commission-instituted investigation. Consequently, the Commission has for many years enforced the Shipping Act against State-run marine terminal operators by means of Commission-instituted investigations and also by proceedings initialed by *private* complaints. Whenever a State-run or purportedly State-run marine terminal operator argued that it enjoyed some type of privilege against claims against it in complaint proceedings, the arguments were quickly rejected on the authority of *California v. United States*. See, e.g., *Perry's Crane Service v. Port of Houston Authority*, 16 S.R.R. 1459, 1480-1484 (I.D.), adopted in relevant part, 19 F.M.C. 548, 556 (1977) (".. the state agency exemption has been demolished"); *Pate Stevedoring Co. of Mobile v. Alabama State Docks Dept.*, 24 S.R.R. 657, 670-673 (I.D.), adopted, 24 S.R.R. 1221 (1988).

However, in view of the decision in *Seminole Tribe of Florida* and several followup decisions of the Court, namely, *College Sav. Bank* v. *Florida Prepaid Postsecondary Ed. Expense Board*, 119 S. Ct. 2219,144 L.Ed 2d 605 (1999); and *Alden* v. *Maine*, 119 S. Ct. 2240,144 L.Ed 2d 636 (1999), the question of whether State-run or arguably State-run marine terminal operators named as respondents in Commission complaint proceedings enjoy 11th Amendment immunity

from *private* suits has arisen.[4] This development has been fueled by the fact that the Court overruled previous Court decisions that had held that States had waived their 11th Amendment immunity or had consented to being sued by *private* parties by virtue of entering into businesses subject to federal regulation and that Congress could abrogate State sovereign immunity under Congress's powers under the Interstate and Indian Commerce Clause of the Constitution.[5] Moreover in *Alden v. Maine*, cited above, the court held that Congress could not even abrogate State sovereign immunity from *private* suits in the State's own courts under the Interstate Commerce Clause. The Court also held that it did not matter in which forum a *private* case was brought as regards State sovereign immunity, although the Court also

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[4]Thus, the question of the States' 11th Amendment immunity from private suits has been raised in Docket No. 99-16 - *Carolina Marine Handling, Inc. v. South Carolina State Ports Authority, et al.*; Docket No. 98-23 - *NPR, Inc. v. Board of Commissioners of the Port of New Orleans*; and in Docket No. 99-04 - *Ceres Marine Terminals, Inc. v. Maryland Port Administration*. However, in No. 98-23 (*New Orleans*), it appears that the federal courts have already decided that the respondent New Orleans Board is not entitled to 11th Amendment immunity, not being an "arm of the State." See Docket No. 98-23 - Further Adjustment of Schedule to Delete Consideration of Special Jurisdictional Issue, December 13, 1999 (ALJ). In Docket No. 99-04 (*Ceres*), the parties have agreed to present the question to a federal court in the future, if need be, rather than to the Commission. The question, however, is being presented to the Commission both in the instant case and in Docket No. 99-16 (*Carolina Marine Handling, Inc.*)

[5]In its decision in *Parden v. Terminal R. Co. of Alabama Docks Dept.*, 377 U.S. 184 (1964), the Court held that a State had consented to being sued by private parties because the State had entered into a federally regulated business, by operating an interstate railroad. The Court expressly overruled *Parden* in *College Sav. Bank of Florida v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S._____, 144 L.Ed 2d 605, 619 (1999). In *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), the Court had held that Congress had the power to abrogate State sovereign immunity under the Interstate Commerce clause. However, in *Seminole Tribe of Florida v. Florida*, 517 U.S. 445 46 (1996), the Court expressly overruled *Union Gas*.

recognized that this immunity doctrine did not extend to "a municipal corporation or other governmental entity which is not an arm of the State," citing cases. *Alden v. Maine*, cited above, 144 L.Ed 2d at 680. None of these cases, it should be emphasized, overturned the longstanding principle that the federal government or its agencies can enforce federal laws in the federal sovereign's name or as agents of the federal government against State-run entities subject to such laws, as contrasted to *private* complaints seeking relief, including money damages, where the doctrine of State sovereign immunity applies. See *College Sav. Bank v. Florida Prepaid, etc.*, cited above, 144 L.Ed 2d at 620 n. 3, citing *United States v. Texas*, 143 U.S. 621 (1892); *Employees v. Missouri Public Health Dept.*, 411 U.S. 279, 286 (1973), citing *United States v. Mississippi*, 380 U.S. 128, 140-141 (1965). SCSPA therefore does not contest the Commission's jurisdiction to conduct Commission-instituted proceedings against State-run terminal operators like SCSPA. (SCSPA's Motion at 15-16.)

If SCSPA's argument is correct and the Commission lacks jurisdiction to regulate truly State-run marine terminal operators by means of *privately* initiated and *privately*-prosecuted complaint proceedings, a decision so holding would change the form in which the Commission enforces the 1984 Act against true "arms" of the States. It would in no way affect the manner in which the Commission regulates all other entities subject to the 1984 Act, but, as regards true State entities, it would eliminate *private* money-damages awards. Because such a decision would have some impact on Commission enforcement, as described, the matter should be addressed by the Commission even if the impact is not substantial. I also find no reason based on precedent that would warrant the Commission in deferring ruling on the matter at this time, as I explain below.

The first matter that I consider is the fact that SCSPA's Motion goes to the very jurisdiction of the Commission under the Shipping Act even to retain the complaint on its docket. The Commission has indicated that it approves of its judges

addressing a jurisdictional issue before proceeding to consider the merits of complaints. Thus, in *River Parishes Co., Inc. v. Ormet Primary Aluminum Corp.*, 28 S.R.R. 751, 762 (1999), the Commission stated that "an agency must reach jurisdictional issues before addressing the merits of a case." The Commission cited one of its earlier decisions in *Government of the Territory of Guam v. Sea-Land Service, Inc. (Gov-Guam)*, 28 S.R.R. 252, 265 (1998); and *Osborn v. United States*, 918 F.2d 724 (8th Cir. 1990). The Commission noted that sometimes the agency could bypass deciding a jurisdictional issue and proceed to decide the merits of a case when the merits and jurisdiction were intertwined and when the merits were so easy to decide that "the better use of administrative resources warrants a disposition on the merits without a finding of jurisdiction." (*Id.*) However, as the Commission noted, the Supreme Court abrogated the second reason to bypass deciding jurisdictional issues as regards federal courts in the case of *Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003, 1012 (1998). The issue as to SCSPA's State sovereign immunity is separate from the merits of the complaint and the merits are not easily determined without a thorough investigation of the facts of alleged discrimination and the application of local South Carolina law. Consequently, I conclude that the jurisdictional issue should be addressed and resolved now exactly for the reasons given in *GovGuam* as well as the reasons given below.

The next matter that I have considered is the fact that deciding an issue under the 11th Amendment does implicate the Constitution and the Commission has declined to rule upon a constitutional issue in a past case. Thus, in *Plaquemines Port v. Federal Maritime Commission*, 838 F.2d 536, 544 (D.C. Cir. 1988), the court affirmed the Commission's decision in *New Orleans Shipping Association v. Plaquemines Port*, 23 S.R.R. 1363, 1371 (1986), in which the Commission found several marine terminal charges to be unlawful under the Shipping Act but declined to address a constitutional question as to their validity under a non-Shipping Act provision of the Constitution.

The court stated that the Commission could have decided the constitutional question but did not have to and the court itself decided the question so as to affirm the Commission's decision on the Shipping Act issues.

More recently, in the ongoing case of Docket No. 94-01 - *Ceres Marine Terminals, Inc. v. Maryland Port Administration*, which is now before the Commission on remand from the Fourth Circuit Court of Appeals, the respondent Maryland Port Administration (MPA) has agreed with complainant Ceres to defer litigating the question as to whether MPA is an "arm" of the State of Maryland entitled to 11th Amendment immunity and has agreed to raise the question before a court if necessary. The Commission approved the agreement of the parties and stated that "any Eleventh Amendment and sovereign immunity issues can be resolved most appropriately and efficiently in federal court." Docket No. 94-01, Order Granting Joint Motion to Approve Stipulation, September 17, 1999, at 2. I do not conclude that I should defer ruling on SCSPA's Motion on account of the *Plaquemines* or *Ceres* rulings for the reasons given below.

In the instant case, SCSPA is not asking the Commission to interpret a provision of the Constitution having nothing to do with the Shipping Act. In *Plaquemines*, the particular constitutional provision in question concerned a prohibition against taxes on exports. In the instant case, however, SCSPA is asking the Commission to rule upon the scope of its jurisdiction under the Shipping Act and whether SCSPA's defense of State sovereign immunity from *private* suits is a valid one under that Act. Surely the Commission is able to rule upon its own statute and if Congress has been silent on the question, a court will defer to the Commission's interpretation of its own enabling Act if the interpretation has a reasonable basis. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

In the *Ceres* case, the parties agreed to postpone litigating the question as to whether MPA was an "arm of the State"

entitled to 11th Amendment immunity from *private* complaints. Obviously that has not happened in the instant case in which SCSPA wants a ruling now on the question. Secondly, the parties have largely progressed beyond the hearing stage in *Ceres* unlike the instant case which is in its very early stages. Therefore, MPA would have less motivation in having its jurisdictional defense decided by the Commission in the interest of avoiding the burden and expense of mounting a defense on the merits of the complaint. Thirdly, whether MPA is an "arm of the State" entitled to 11th Amendment immunity has apparently never been decided by any court, at least counsel for MPA has not cited any such court decision to the Commission as far as I am aware. By contrast, in the instant case, the Fourth Circuit Court of Appeals has decided the question as to SCSPA and found SCSPA to be a bona fide "arm of the State" that qualifies for the 11th Amendment immunity. See *Ristow v. South Carolina Ports Authority*, 58 F.3d 1051 (4th Cir. 1995). As the court's decision in *Ristow* illustrates, determining the status of a purported State run marine terminal operator under the 11th Amendment is not an easy task but requires consideration of a number of factors, including State law. *Ristow*, 58 F.3d at 1052 n. 3.[6] Consequently, the Commission need not defer to a court to await the court's decision as to whether SCSPA is entitled to 11th Amendment immunity from *private* suits nor as to whether SCSPA has consented to being "sued" by a *private* complainant. In the instant case the Commission

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[6]The determination of an entity's status as an "arm of the State" entitled to 11th Amendment immunity from private suits involves consideration of complicated factors under tests enunciated by the Supreme Court and the Circuit Courts of Appeals. In *Ristow*, the court cited a Supreme Court decision setting forth six factors to consider, and the Fourth Circuit "distilled" these factors into four, including how the entity was treated as a matter of state law. *Ristow*, 58 F.3d at 1052 n. 3. Other circuit courts have described the process as involving a "multi-factor, fact-intensive 'arm of state' test." *Parella v. R.I. Employees' Retirement System*, 173 F.3d46, 54-55 (1st Cir. 1999). See also *Supreme Court 's Construction of Eleventh Amendment, Restricting Federal*

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need only decide if it must alter the form in which it enforces the Shipping Act against State entities that operate marine terminals by relying on Commission-instituted investigatory proceedings rather than on *private* complaints. By deferring ruling on SCSPA's Motion at this time, there is a risk of delay because SCSPA could probably seek immediate court review under the so-called "collateral order" doctrine that allows an aggrieved party whose rights will be irretrievably lost without immediate judicial review to seek such review before being forced to undergo the burden and expense of defending on the merits in what could be a lengthy trial. The normal rule governing judicial review of the Commission's decisions under the Judicial Review Act (the "Hobbes Act") precludes judicial review before there is a "final order" of the Commission. See 28 U.S.C.A. sec. 2344. This rule is known as the "ripeness for review" doctrine in administrative law. The Supreme Court has explained that the reason for the rule is to prevent premature judicial interference with administrative proceedings, but the Court also recognized that under some circumstances judicial review might be necessary at an early stage. In the words of the Court:

> ... it is fair to say that its [the ripeness for review doctrine] basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling

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Judicial Power Over Suits Against States, 106 L.Ed 660-720 (1991). Whether a particular quasi-public port authority or commission is entitled to 11th Amendment immunity depends upon local laws and considerations. SCSPA has been found to qualify for 11th Amendment immunity. However, other port commissions or authorities have not been so found. See, e.g., *Principe Compania Naviera, S.A. v. Board of Commissioners of the Port of New Orleans*, 333 F. Supp. 353 (E.D. La. 1971) (Board not entitled to 11th Amendment immunity); *Jacintoport Corp. v. Greater Baton Rouge* Port, 762 F.2d 435 (5th Cir. 1985) (Baton Rouge Port Commission not entitled to 11th Amendment immunity). Clearly, as the Commission stated in *Ceres*, the status of MPA under the 11th Amendment "can be resolved most appropriately and efficiently in federal court."

> themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, *requiring us to evaluate both the fitness of the issues for judicial decisions and the hardship to the parties of withholding court consideration. Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149 (footnote omitted) (emphasis added).

If the Commission defers ruling on SCSPA's Motion or denies it, the SCSPA, an "arm of the State," will be forced to undergo the burden and expense of defending against a *private* party in a complaint proceeding even though the Fourth Circuit Court of Appeals has found that SCSPA is a bona fide State "arm" entitled to 11th Amendment immunity from *private* suits. The Supreme Court views the denial of a State entity's immunity rights under the 11th Amendment to be so important that it has held that a State entity has the right to an immediate appeal to a court if its motion is denied. See *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 1399 146 (1993), in which the Court described the importance of respecting the 11th Amendment's protection of and respect for the States' "dignitary interests." In the words of the Court:

> "The very object and purpose of the 11th Amendment were to *prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.*" (Case citation omitted.) The Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including a sovereign immunity. (Case citation omitted.) It thus accords the States the respect owed them as members of the federation. While application of the collateral order doctrine in this type of case is justified in part by a concern that States not be unduly burdened by litigation, *its ulti-*

mate justification is the importance of ensuring that the States' dignitary interests can be fully vindicated. (Footnote quoted below in part.) (Emphasis added.)

In the footnote to the above quotation, the Court rejected the argument that the States need not enjoy their special immunity from *private* suits because they might be able to "bear the burden of litigation" better than could individual officials. The Court remarked:

> The Eleventh Amendment is concerned not only with the States' ability to withstand suit, but with their *privilege not to be sued.* (Emphasis added.)

Other decisions of the federal courts allowing immediate appeals to courts before requiring entities to undergo the burdens of defending on the merits when they would irretrievably lose rights thereby illustrate how the courts find it necessary to shortcut the usual appellate procedure that requires parties to litigate all issues to termination before seeking judicial review.[7]

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[7]The "collateral order" doctrine was designed to protect parties from losing the protection of a valuable right or privilege which was a "separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 558 (1963). In the case cited, defendants raised a special immunity from-suit statutory defense which had to be decided at the outset rather than subject the defendants "to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings. The "collateral order" doctrine originated in the case of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). In *Cohen*, the Court allowed immediate appeal because if judicial review were postponed until the termination of the litigation of the merits of the case, "it will be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably." *Cohen*, 337 U.S. at 546. In the instant case, if SCSPA loses its claimed immunity from a *private* complaint and even assuming that it prevails on the merits, it will have lost the protection against enduring the burden, expense and "indignity" of defending against a private party, a protection that the Supreme Court believes that States should have.

In conclusion, I can find no valid reason to defer ruling on SCSPA's Motion or to deny SCSPA the protection from *private* suits that the Fourth Circuit has already found that SCSPA has. Nor do I see any significance to an argument that the doctrine of 11th Amendment-State sovereign immunity from *private* suits does not extend to administrative proceedings. The Supreme Court has held that statutes enacted by Congress under Article 1, sec. 8, cl. 3 of the Constitution (the Interstate and Indian Commerce Clause) cannot abrogate the States' 11th Amendment immunity. See *Seminole Tribe of Florida v. Florida*, cited above. If federal courts that are established under Article III of the Constitution must respect States" 11th Amendment immunity and Congress is powerless to override the States' immunity under Article I of the Constitution, it is irrational to argue that an agency like the Commission, created under an Article I statute, is free to disregard the 11th Amendment or its related doctrine of State immunity from *private* suits. To do so would appear to be inconsistent with the Supreme Court's holding in *Alden v. Maine*, cited above, 144 L.Ed 2d at 665, that "The logic of the decisions [interpreting State immunity under the 11th Amendment] . . . does not turn on the forum in which the suits were prosecuted . . . ." To find that the Commission has the power to disregard an 11th Amendment claim of immunity from proceedings initiated by *private* parties would mean that the Commission, which cannot enforce its orders without the aid of the federal courts, has a power that those courts lack.[8] At least one court which has addressed the question of whether an Article I agency can entertain a proceeding brought by a *private*

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[8]Enforcement of Commission orders for payment of money can only be done if "the person to whom the award was made" seeks enforcement of a Commission order in a United States district court. See sec. 13(d) of the 1984 Act, as amended. Enforcement of nonreparation orders (i.e., cease and desist orders) similarly requires an order of a district court. See section 13(c) of the 1984 Act, as amended. As another example of the futility of a *private* party trying to prove its allegations of violations of the Shipping Act in a *private* complaint proceeding that seeks a cease and

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party against a State agency entitled to 11th Amendment immunity has held that the proceeding had to be dismissed. See *Hensel v. Office of Chief Admin. Hearing*, 38 F.3d 505 (10th Cir. 1994). However, it is unnecessary for the Commission to become involved in an 11th Amendment controversy, which would occur if the Commission decides to retain the instant *private* complaint and continue the instant proceeding in the form in which it was brought against SCSPA. That is because the Commission has the authority to look into allegations of Shipping Act violations and enforce the Shipping Act by means other than *private* complaints, which other means are not barred by the 11th Amendment.

The Commission, of course, is authorized by law to institute a formal investigatory proceeding into any violations of the Shipping Act whether committed by an "arm of the State" or by a purely private entity. See section 11(c), Shipping Act of 1984. Alternatively, the Commission could simply refer the allegations in the complaint to the Bureau of Enforcement (BOE) and await

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desist order plus an order for the payment of reparations (money damages), such party would have to go to federal court for enforcement against the State "arm." But what federal court would take jurisdiction of a *private* suit for enforcement of a reparations award that would have to be paid out of the State treasury? Furthermore, the complainant in the instant case would have to seek enforcement in a district court in South Carolina, which lies in the Fourth Circuit. But according to the Fourth Circuit's opinion in *Ristow v. South Carolina Ports Authority*, cited above, 58 F.3d at 1054. .. "a judgment against the Ports Authority cannot be legally enforced against the state." For that matter, how would complainant even obtain enforcement of a cease and desist order against SCSPA, such order being equivalent to an injunction issued by a federal court. See *Seminole Tribe of Florida v. Florida*, cited above, 517 U.S. at 58 (the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997) (if State is the real party affected by the *private* suit, the State enjoys immunity from a suit seeking injunctive relief); *Hensel v. Office of Chief Administrative Hearing*, 38 F.3d 505, 508-409 (10th Cir. 1994) (State is immune from private suit seeking prospective injunctive relief).

BOE's recommendations. For example, in Docket No. 98-13 - *Tak Consulting Engineers v. Sam Bustani et al*, the Commission referred complainant's request for a formal investigation into the activities of respondent NVOCCs to BOE, stating:

> The Commission has determined to refer the request for an investigation to its Bureau of Enforcement, so that it may decide whether to recommend initiation of a formal investigation in this case or take other appropriate action. Docket No. 98-13 - Order Referring Request for Investigation to Bureau of Enforcement, September 11, 1998, 28 S.R.R. 578.

Alternatively, the Commission may dismiss the instant complaint and instruct complainant first to seek a ruling from the appropriate South Carolina State court as to the lawfulness of SCSPA's conduct under South Carolina law, namely, Charleston Ordinance Sec. 21-179, before asking the Commission to look into the complainant's allegations.

Whatever procedure the Commission may choose that is not barred by the 11th Amendment, as is the instant *private* complaint proceeding, SCSPA's arguments that Congress intended to leave to the States the matter of regulating cruise ships offering gambling will have to be considered as will the question as to how South Carolina law, namely, Charleston Ordinance Sec. 21-179, affects the issues.[9]

The instant complaint is dismissed on the basis of respondent SCSPA's entitlement to immunity from *private* suits under the 11th Amendment to the Constitution and its related doctrine

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[9]Two other cruise ship operators have sought and obtained rulings from the federal and State courts under South Carolina anti-gambling laws that did not speak to the instant situation at Charleston. See *Casino Ventures v. Stewart*, 183 F.2d 307 (4th Cir. 1999); and *Stardancer Casino, Inc. v. Robert M. Stewart, Sr., et al.*, Court of Common Pleas, State of South Carolina, County of Charleston (attached as Exhibit A to complainant's Response to SCSPA's Motion to Dismiss). No court has yet interpreted Charleston Ordinance Sec. 21-179. By bypassing the opportunity to obtain a declaratory or similar ruling from a State court, Maritime Services is ask-

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of State sovereign immunity from *private* suits. This ruling is subject to whatever action the Commission might deem appropriate with respect to complainant's allegations that SCSPA has violated the Shipping Act.[10]

/s/
Norman D. Kline
Administrative Law Judge

(...continued)
ing the Commission to invade the province of the State courts to some extent and to make detailed findings of fact under State law regarding the status of complainant's ships as compared to those of Carnival Cruise Lines, the alleged preferred person. A ruling by a State court could eliminate the alleged discrimination or at least narrow the issues. When there is a question of State law that might resolve or substantially alter the ultimate determination of a federal case, federal courts "abstain" to allow the State courts to rule on the matter under local law. See the leading cases of *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); and *Louisiana Power & Light Co. v. City of Thibodeaux*, 360 U.S. 25 (1959). The Commission has followed its own version of "abstension." In *Burlington Northern Railroad Co. v. M.C Terminals*, 26 S.R.R. 934 (1993), the Commission declined to rule on the Shipping Act lawfulness of a certain marine terminal operator's practice that intimately involved a railroad's duties under the Interstate Commerce Act. The Commission ordered the parties before it to initiate a proceeding before the Interstate Commerce Commission (I.C.C.), failing which the Commission would dismiss the complaint. If the parties initiated such a proceeding, the Commission announced that it would hold the pending complaint case before the Commission in abeyance pending ruling of the I.C.C. (26 S.R.R. at 950).

[10]I am aware of the fact that respondent SCSPA has also moved for dismissal on 11th Amendment grounds in Docket No. 99-16 - *Carolina Marine Handling, Inc. v. SCSPA et al.*, and that Judge Dolan has denied a motion to partially consolidate this case with that one but will consider all necessary pleadings in both cases before ruling. See his ruling in Docket No. 99-16, January 4, 2000. SCSPA's Motion in the instant case was filed as long ago as November 19, 1999, has been answered by the complainant in the instant case, and has been ripe for decision for some time. The instant ruling will obviously have precedential value. Complainant in Docket No. 99-16 is not a party to the instant case. However, it will now have the opportunity of analyzing the instant ruling and addressing the reasons I have given for dismissal before filing its reply to SCSPA's Motion in No. 99-16, now due on January 18, 2000.

APPENDIX D

Section 3 of the Shipping Act of 1984, 46 U.S.C. app. 1702.
Definitions.

As used in this chapter -

...

(14) "marine terminal operator" means a person engaged in the United States in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier, or in connection with a common carrier and a water carrier subject to subchapter 11 of chapter 135 of title 49.

Section 10 of the Shipping Act of 1984, 46 U.S.C. app. 1709.
Prohibited acts.

(b) Common carriers
No common carrier, either alone or in conjunction with any other person, directly or indirectly, may ...

(10) unreasonably refuse to deal or negotiate

...

(d) Common carriers, ocean transportation intermediaries, and marine terminal operators.

...

(3) The prohibitions in subsections (b)(10) and (13) of this section apply to marine terminal operators.

(4) No marine terminal operator may give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person.